IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3088-52

THOMAS T. KEANE, *Plaintiff*

v.

THE AMERICAN INSURANCE COMPANY OF THE CITY OF NEWARK, NEW JERSEY, *Defendant*

Order for Judgment

This cause having come on for trial before the Court and a jury, and the same having been heard upon the evidence and testimony adduced by the parties, and special issues of fact having been submitted to the jury and the same having been answered by the jury in favor of the plaintiff, and the Court having heard the argument of counsel in open court and having received and considered their memoranda and briefs, and having filed herein a memorandum opinion the 3rd day of January, 1955, it is by the Court this 5th day of January, 1955,

ORDERED, that the motion of the defendant for judgment, notwithstanding the verdict, is overruled, and the motion of the defendant for a new trial is also overruled; and it is further

ORDERED, that the motion of the plaintiff for judgment herein be and the same is granted; and the plaintiff, Thomas T. Keane, shall have and recover of and from the defendant, The American Insurance Company of the City of Newark, New Jersey, the sum of Twenty Two Thousand Four Hundred and 74/100 dollars ($22,400.74), with interest on Five Thousand Dollars ($5,000.00) from the 9th day of November, 1949, and with interest on Thirteen Thousand Seven Hundred Fifty Dollars ($13,750.00) from the 4th day of June, 1952, and with in-

terest on One Thousand One Hundred Fifty and 74/100 dollars ($1,150.74) from the 26th day of August, 1949, besides the costs of this action.

JENNINGS BAILEY
Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12636

THE AMERICAN INSURANCE COMPANY OF THE CITY OF NEWARK, NEW JERSEY, a corporation, APPELLANT,

v.

THOMAS T. KEANE, APPELLEE.

Appeal from the United States District Court for the District of Columbia

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Decided January 26, 1956

Mr. John M. Aherne, with whom *Mr. Richard W. Galiher* was on the brief, for appellant.

Mr. Thomas S. Jackson, with whom *Messrs. Louis M. Denit, Martin R. Fain* and *Richard A. Bishop* were on the brief, for appellee.

Before PRETTYMAN, WILBUR K. MILLER and DANAHER, Circuit Judges.

DANAHER, *Circuit Judge*: Appellee, Keane, sued on a marine insurance policy to recover sums he had been obliged to pay after his racing speed boat had collided with a small outboard pleasure craft, owned by one Bowen. One occupant of the latter craft was killed and the other was injured. The trial judge denied a motion filed by appellant, the Company, for a directed verdict at the conclusion of all the evidence, and likewise overruled the Company's motions for judgment notwithstand-

ing the verdict and for a new trial. The amounts paid by Keane in compromise of the claims against him were stipulated to be reasonable, and from the judgment for some $22,400, the Company has appealed.

June 5, 1949, appellee intended to race his boat in water tributary to Chesapeake Bay. His speed craft, capable of speeds up to 90 miles per hour, had not been functioning to his satisfaction, but after certain adjustment, appellee took the craft for a trial spin. When not under power, the boat lay flat on the water, but upon attaining a speed of some 15 to 25 miles per hour, it "planed," its bow out of water. Keane, operating the boat toward Chesapeake Bay, missed a guide buoy, presently realized his error, and then made a right turn which cleared his vision, previously obscured by the glare of sunlight on spray on his windshield. Having ascertained his position, he turned again, sharply, but the boat, then traveling about 35 to 40 miles per hour, skidded. By now, badly off course, Keane's boat was in waters where lay many small boats, carrying spectators. Up to this time, Keane had not seen the smaller Bowen craft some 200 feet ahead. Becoming aware of its presence, with his speed boat still skidding, he cut off the ignition by throwing a switch and also removed his foot from the accelerator, each of which actions, independently, would stop the operation of the motor. Such steps, designed to bring the craft out of the skid, occurred when Keane was a "little less than a hundred feet" from the outboard runabout. As he testified, in a matter of "four, five seconds" or "it may have been three or four seconds," the speed boat skidded broadside into the smaller craft. Both boats were severely damaged and sank, at or near the point of impact.

Appellee argued that the cause of the claims against him was his own negligence. Appellant argued that the

claim was one expressly excepted from the policy coverage.[1]

The language of the policy upon which this case will turn reads:

> "It is understood and agreed that *this insurance* is *free* from *claim for loss or damage*:
> "1. During such time as the vessel's engine is operating.
> "2. *Resulting from* the operation of the vessel's engine *whether caused by a peril insured against* or *not*." (Emphasis supplied.)

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[1] Keane's testimony on cross examination here may help us understand the problem:

> "Q Now, it was the momentum imparted to the 'Tomadge IV' [Keane's craft] by the operation of the motor that brought you in contact with the Bowen boat; was it not?
> "A Yes, sir.
> "Q And if your engine had not been running immediately prior to the accident, the accident would not have happened; would it?
> "A No."

To counter such testimony, Keane's counsel, on redirect, developed the following:

> "Q Now, in response to a question asked by Mr. Aherne, you testified that if the engine had not been running, the accident would not have happened. Let me ask you this: If you had steered your boat properly and if you had had a clear vision of the Bowen boat and the boats surrounding it, would the accident have happened?
> "A No.
> "Q Would you have been able to avoid the accident, regardless of the operation of the motors by steering past the Bowen boat?
> "A I would have.
> "Q Could you have steered past the Bowen boat if you had seen it as early as the moment you passed the Buoy S-6?
> "A Had I seen it then, I would have had plenty of time to miss it."

Each side moved that a verdict be directed in its favor, appellant claiming that the engine of Keane's craft was either operating at the instant of collision; or the collision itself, on the physical facts, the testimony, and admissions of Keane, resulted from the operation of the vessel's engine. Both motions were denied.

The trial judge, without definition of proximate cause, submitted to the jury two interrogatories which may be summarized thus: (1) When the collision occured, was the engine in Keane's craft operating? (2) Did the collision result from the operation of the engine in Keane's craft? The jury was told, at appellee's request, it was not to be concerned in the decision of these two questions with how the legal issue on the construction of the policy is answered by the court, "nor with the evidence bearing on the legal construction of it." [2] The jury answered both questions in the negative.

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[2] Appellant sought to introduce evidence as to rates in this type of risk, and as to the understanding of the parties generally, and of appellee, in particular, as to the coverage to be afforded by the policy. Such evidence was excluded upon objection by the appellee, although it came out that the policy in suit supplanted an earlier policy carried by the appellee, which provided that "insurance on the within named vessel ceases at the moment that the vessel is launched." Moreover, appellee testified he knew that under the instant policy he had no coverage *on the hull* when the engines were operating or for damage to the hull as a result of the operation of the engines. Appellee's insurance broker, his cousin, in a letter transmitting the instant policy informed appellee: "This coverage is the same as you previously had, with the exception that at your request, we have added protection while loading and unloading from a crane or other means."

We need not decide, but may note that such evidence is generally admissible in a trial of all issues. Here the jury was asked merely, but improvidently as we shall develop, to answer the interrogatories above. See General Mutual Insurance Company v. Sherwood, 55 U.S. 351, 362-63 (1852); Reed v. Insurance Co., 95 U.S. 23, 30-31 (1877); Standard Oil Co. v. United States, 340 U.S. 54, 60 (1950).

Certain additional background is necessary to an understanding of the case. During colloquy between counsel and the trial judge the latter said:

> "THE COURT: This policy is very confusing to me. In the first part of it, where it lists the amount of damages for which they may be liable, that looks like the ordinary automobile policy.
>
> "MR. AHERNE: It has very many elements, Your Honor, which are similar to the automobile policy, yes.
>
> "THE COURT: And yet when it says here: 'This insurance is free from claim for loss or damage during such times as the vessel's engine is operating;' that would seem to nullify those provisions, because that would be ordinarily the time in which an accident would happen. (J.A. 44)
>
> • • • •
>
> "THE COURT: . . . An extraordinary policy to me.
>
> "MR. JACKSON: I think it is, sir.
>
> "MR. AHERNE: Your Honor, it is a special type of policy, a tailor-made policy to fit an unusual situation.
>
> "THE COURT: Well then, it would boil down simply to a question of whether this motor was operating and your contention is that even if it wasn't, it was the result of the motors having operated.
>
> "That is another question. I am trying to get the issues straight in my head." (J.A. 46)

At the close of the appellee's case appellant's counsel said:

> "I think at this point it is a matter of construction of the language of the document for the Court; and I think Your Honor at this time should perform the function of construing the policy and should grant Defendant's motion to dismiss this action at this time." (J.A. 55)

The trial judge ruled:

> "So I will let the case go to the jury, Mr. Aherne. You, of course, reserving the right to move at the

close of all the evidence and after judgment." (J.A. 59)

Having received the jury's answers to the interrogatories, the trial judge took the case under advisement and later filed his memorandum directing judgment for the appellee and overruling appellant's motions. We quote from the judge's memorandum with emphasis supplied:

> *"During the operation of the speed boat a collision occurred* with another boat . . . . (J.A. 11)
>
> • • • •
>
> "As to the liability of the plaintiff for the result of the collision, there is no question that his negligence was the proximate cause of the collision and his liability and the reasonableness of the amount paid in settlement of it is conceded, but the defendant contends that the fact that the plaintiff's boat had been put in motion by the engine constituted an additional or concurring proximate cause of the collision. *It is true that had the engine not imparted the original motion to the boat the collision would not have occurred*, but this fact seems to constitute rather a condition than a cause.
>
> "It was not the negligent operation of the engine, nor any explosion of it nor defect in it that cause[d] the collision, but the cause of the collision was the negligent manner in which the boat was steered. In an ordinary collision between two automobiles, the cause of the collision is not the fact that the two cars were in motion imparted by their engines, but the manner in which the cars were driven.
>
> "The verdict of the jury was in the negative in answer to the two issues, and I see no reason to disturb the verdict. After all that may be said, *the purpose of insurance is to insure.*" (J.A. 12-13)

Enough has been said to indicate that the trial judge conceived the policy to be one covering such liability of the appellee as might arise from the operation of the speed boat. There is no question that as between Keane and the victims of the collision, Keane's negligence was

the proximate cause of their loss. But the policy had expressly excepted this insurance from claim for loss or damage resulting from the operation of the vessel's engine, whether caused by a peril insured against or not. Even were we to say that the trial judge properly submitted the interrogatories to the jury,[3] there remained to him the power to make findings as to issues not submitted.[4] Thus his memorandum specifically finds that the collision occurred "during the operation of the speed boat" and "It is true that had the engine not imparted the original motion to the boat the collision would not have occurred . . . ." On the facts as thus found, quite apart from Keane's negligence in relation to the death and injury to the victims, *as between the insured and the appellant*, it is clear that the collision must be attributed to a cause "resulting from the operation of the vessel's engine."

Keane argues first, that we are bound by the findings of the jury in response to the interrogatories. Next, he here contends as he did in the trial court, "that the two limiting clauses which appear on the first page of the insurance document do not limit or restrict the liability of the insurance carrier under the provisions of the protection and indemnity clauses of the policy."[5] He thus

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[3] FED. R. CIV. P. 49(a).

[4] Columbia Horse & Mule Commission Co. v. American Ins. Co., 173 F. 2d 773 (6th Cir. 1949); 5 MOORE, FEDERAL PRACTICE ¶ 49.01 *et seq.* (2d ed. 1951).

[5] The pertinent portions of the "P. and I." clause may be summarized thus:

"And we further agree that if the Assured shall by reason of his interest in the insured vessel become liable to pay and shall pay any sum or sums in respect of any responsibility, claim . . . damages . . . arising from or occasioned

would have us say that the hull insurance was one contract and the protection and indemnity insurance another. The law is clear that for Keane to recover, he must bring himself within the terms of the policy.

Before any policy was issued, Keane was his own insurer on all accounts, as to collision, negligence, or any other type of risk which might result in claim for loss or damage, no matter how caused. He sought protection against some of the consequences of such risks. The

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by any of the following matters . . . during the currency of this Policy in respect of the vessel hereby insured, that is to say:—

"(1) Loss of or damage to any other vessel . . . .

* * * *

"(11) Loss of life or personal injury . . . . we will pay the Assured such sums so paid or which may be required to indemnify the Assured for such loss; PROVIDED always that the liability of this Company, in respect to any one person, is limited to the sum stated as 'Personal Injury Any One Person' in the schedule of policy limits above and subject to the same limit for each person, to the sum therein stated as 'Personal Injury Any One Accident,' it being understood that this limit applies to any one accident or series of accidents arising out of the same event.

* * * *"

The schedule of policy limits reads:

"This insurance is limited to those Coverages indicated below and opposite which a premium is specified.

"For Hull $7,000.00 Rate Chg. %	Premium $ 70.00
"For Protection and Indemnity (including Longshoremen's and Harbor Worker's Compensation) $25,000.00 Property Damage) $25,000.00 Personal Injury,) Any One Person) $50,000.00 Personal Injury,) Any One Accident)	Premium $ 37.50
	Total Premium $107.50"

Company agreed to accept all risks named in "this insurance," subject to the exceptions. Keane knew that the craft was in the water only 25 hours per year. The instant policy, subject to the exceptions, clearly covered claims for loss or damage due to fire, explosion, marine perils, windstorm, risks of transportation, and risks due to many other causes, whether the craft was afloat or ashore. Again subject to the exceptions, the policy even covered Keane's negligence in various particulars. But as to all possible claims for loss or damage, whether caused by a peril insured against or not, Keane remained, as before, a self-insurer *if the exceptions applied.*[6] Thus all risks were borne by the Company most of the time, but all risks were borne by Keane some 25 hours per year as to claims arising "during such time as the vessel's engine is operating" and as to claims "resulting from the operation of the vessel's engine." To paraphrase Mr. Justice Curtis, distinctions in the coverage of marine insurance contracts may sometimes be difficult to trace, and mistakes have doubtless been made in applying them. But such distinctions must be made as the *parties* made them. It is of no small consequence in the law of insurance that the courts ascertain and apply such distinctions, for to disregard them will inevitably produce confusion.[7]

Here was a craft which was lowered into the water by crane before each race and similarly removed afterward. It was transported on land from place to place as racing meets occured. Using high octane gasoline, it was subject to overheating and explosion if run too long at speeds less than 20 miles per hour. Having attained

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[6] Insurance Co. v. Transportation Co., 79 U.S. 194, 201 (1870).

[7] See General Mutual Insurance Company v. Sherwood, 55 U.S. 351, 365 (1852).

such speed, it planed, its bow out of water, and, thus operated, was capable of speeds up to 90 miles per hour. Of light construction, skimming along the surface, it was subject to possible skids if turned too abruptly, as occurred in this very case. No doubt, the policy here involved was special and peculiar to the craft and the purposes for which it was utilized. The parties accordingly agreed that whether a claim was caused by a peril insured against *or not*, if that cause be one "resulting from the operation of the vessel's engine," the carrier shall not be liable, and Keane in that circumstance and to that extent remained a self-insurer. Thus "we must look beyond the peril to its cause, to ascertain the efficient cause of the loss,"[8] whether it be one "resulting from the operation of the vessel's engine," or not. What will be our test?

Whether a peril be one insured against, or one within an exception and hence not covered, the courts have determined the ultimate liability on the basis of the maxim, *causa proxima, non remota, spectatur*. Where separate and successive causes can be "discriminated," a proper share of the loss is assigned to each insurer.[9] When there are two concurring causes of a loss, "the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished."[10] Where a peril insured against finds its cause in one not covered, as within an exception in the policy, it has been held that the carrier is not liable.[11] In the

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[8] *Ibid.*

[9] Insurance Co. v. Transportation Co., *supra*, 79 U.S. 194 (1870).

[10] *Id.* at 199.

[11] Richelieu Nav. Co. v. Boston Ins. Co., 136 U.S. 408 (1899).

Richelieu case the Court approved a charge that a defective compass as constituting unseaworthiness, and the facts that the steamer was running at full speed through heavy fog when an inadequate watch was maintained as constituting negligence, could be said to be causes not covered where the policy excepted liabilty for unseaworthiness or negligence. Then there is the line of cases where the courts were asked to ascertain the cause of loss as between "perils of the sea," marine risks, and "warlike operations," as war losses, under war risk insurance contracts, most recently illustrated in the *Standard Oil* case.[12]

Running throughout all such cases we find the test to lie in the determination of the proximate cause of the claim for loss or damage. Unlike the cases cited, however, we here find that the parties expressly agreed that whether the claim was caused by a peril insured against or not, "this insurance" was to be free from claim for loss "resulting from the operation of the vessel's engine."

Thus, whether the collision or Keane's negligence was a peril insured against or not, or whether the former was caused by the latter, becomes immaterial. What is critical is whether the claim was one "resulting from" the operation of the racing boat's engine.

We have found no case squarely in point and none has been cited to us. But by analogy from what has been said, we see no reason why the words "resulting from" should not be held flatly to mean what the parties would reasonably expect and understand them to mean. The verb "result" is defined: "To proceed, spring, or arise as a consequence, effect, or conclusion."[13] Thus if the claim

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[12] Standard Oil Co. v. United States, 340 U.S. 54 (1950).

[13] MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1953).

proceeds from or arises as a consequence of or is occasioned by the operation of the vessel's engine, it is one "resulting from" such operation. And we likewise see no good reason why the test of proximate cause should not here be applied.

We therefore seek "the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result."[14]

That the operation of the speed boat's engine set in motion every force involved in this catastrophe cannot be doubted. Though Keane's negligence concurred, or even if it supervened, it was incidental, for the operation of the engine was the predominant, efficient causative factor of the claim for loss or damage. Upon principle and authority, the claim made by Keane was one "resulting from" the operation of the engine, and hence was specifically within the exception in the policy. It is our duty so to rule as a matter of law where the language is clear and where the facts so unerringly bring the case within its compass.[15]

But, Keane argues further, the policy on its second page set out the "Protection and Indemnity Clause" to which the typewritten exceptions on the first page do not

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[14] Insurance Co. v. Boon, 95 U.S. 117, 130 (1877), cited with approval in The G. R. Booth, 171 U.S. 450, 456-457 (1898); and see Chief Justice Hughes writing in Lanasa Fruit Co. v. Insurance Co., 302 U.S. 556, 562 *et seq.* (1938).

[15] Cf. Williams v. Union Central Co., 291 U.S. 170, 180 (1934); and see Columbia Hospital v. United States Fidelity & G. Co., 88 U.S.App.D.C. 251, 256-57, 188 F. 2d 654, 659-60 (D.C. Cir. 1951).

apply.[16] In any event, he continues, the hull contract on the first page and the "P and I" clauses form two separate and distinct contracts, the latter unmodified by the exceptions. These claims must fall upon a reading of the policy as a whole. At the foot of the first page, in large type, the policy reads: "PROTECTION AND INDEMNITY AND LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION CLAUSES ON REVERSE HEREOF." The amount and type of coverage, the premium to be charged, the limitations of liability and such terms appear on the face of the policy as do the exceptions in issue. The "P and I" clauses on the second page are inextricably linked with the former, indeed the contract is countersigned at Washington and dated by the Company's authorized agent at the foot of the second page *after* the "P and I" clauses and following a paragraph which reads:

> "This policy is made and accepted subject to the stipulations and conditions contained in the form

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[16] Keane's argument, if accepted, thus would compel the conclusion that if his negligence gave rise to the claims, it is immaterial whether the vessel's engine was operating or whether the claims resulted from the operation of the engine. Writing the exceptions into the policy would thus prove to be an inane gesture, for though the craft be driven by its engines at 90 miles per hour, if Keane's negligence be the cause of a claim, he would be protected against liability. It does not seem possible he can seriously urge such a proposition. It may be noted as to the earlier portion of the opinion, he has cited various cases such as Bull v. Sun Life Assur. Co., 141 F. 2d 456 (7th Cir. 1944), *cert. denied*, 323 U.S. 723 (1944). Appellant has cited conversely Order of United Commercial Travelers v. King, 161 F. 2d 108 (4th Cir. 1947, *aff'd*, 333 U.S. 153, *rehearing denied*, 333 U.S. 878 (1948). We have not deemed apposite cases construing "status" clause and "result" clauses in policies such as were considered in such cases, in view of the body of law which has developed in the field of marine insurance.

> hereto attached, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached."

We are not empowered to make a new contract for the parties. It is clear from the one before us that the exceptions applied throughout. Granting to the appellee every favorable intendment to be deduced from the facts, the law commands a judgment for the insurer. The appropriate motions for a directed verdict and for judgment n.o.v. having been made in the District Court, we are constrained to conclude that the judgment should be reversed and that judgment be entered for the appellant.

Reversed.

WILBUR K. MILLER, *Circuit Judge*, dissents.

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FILED
OCT 11 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 411

THOMAS T. KEANE,

Petitioner,

v.

THE AMERICAN INSURANCE COMPANY OF THE CITY OF NEWARK, NEW JERSEY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN INSURANCE COMPANY OF THE CITY OF NEWARK, NEW JERSEY, IN OPPOSITION

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INDEX

	PAGE
Opinions Below	1
Questions Presented	2
Statement of the Case	3
The Proceedings Below	3
The Racing Boat	4
The Accident	4
The Marine Insurance Policy	6
The Decisions Below	7
Argument	10
Respondent's motion for judgment n.o.v. was properly granted by the Court of Appeals. The agreed physical facts and petitioner's solemn admissions made an undisputed record as to how the accident occurred. All questions of policy intent and construction were, by agreement, left to the court, and those are the only issues which the Court of Appeals decided, overruling the trial court. No other issue remained, but if any did remain, petitioner, having agreed to the submission of the two special interrogatories to the jury, under Rule 49 F. R. C. P. waived any right to a jury trial with respect thereto. The issue of the intent and construction of the policy was properly decided. The petition discloses no ground for granting certiorari	10
Conclusion	19

Table of Cases Cited

PAGE

Aetna Insurance v. *Houston Oil*, CA-5, 49 F. 2d 121, cert. den. 284 U. S. 628 11

Brady v. *Southern Ry. Co.*, 320 U. S. 476 15

Galloway v. *U. S.*, 319 U. S. 372 17

Henjes v. *Aetna Ins. Co.*, 132 F. 2d 715, cert. den. 319 U. S. 760 18

Standard Oil Co. v. *U. S.*, 340 U. S. 54 .....11, 12, 16

Tennant v. *Peoria*, 321 U. S. 29 16

Wilkerson v. *McCarthy*, 336 U. S. 53 16

Other Authorities Cited

Rule 50 F. R. C. P. 3, 10

U. S. Constitution, Seventh Amendment 17

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BRIEF FOR THE AMERICAN INSURANCE COMPANY OF THE CITY OF NEWARK, NEW JERSEY, IN OPPOSITION

Opinions Below

The petition mistakenly states that the District Court's opinion is unreported. It is reported at 131 F. Supp. 263, and appears at pages 11-13 of the Record. The opinion of the Court of Appeals is printed in the Appendix to the Petition. It also appears in the Record at pages 105-118, and is reported in 233 F. 2d 354.

Questions Presented

Neither question proposed by petitioner on page 2 of the Petition is fairly presented on this record. No one disputes the elementary proposition that where the record presents a genuine question of fact, constitutional injunctions require that the jury verdict thereon be held conclusive. But that question is not here. The questions here are:

1. Where a specially written insurance policy on the hull and certain liabilities of a high speed hydroplane racing craft, by special typewritten clause, *excludes* claims arising while

> "the vessel's engine is operating"

as well as claims

> "resulting from the operation of the vessel's engine *whether caused by a peril insured against or not*".

and the parties agreed that the question of policy intent and construction is solely for the court (R. 101-102), does the protection of the policy apply where the undisputed fact situation shows a collision of the insured craft with a *stationary* rowboat which occurred immediately after petitioner had shut off his engine to avoid the collision, leaving the insured vessel in sufficient motion to produce a violent collision?

2. Where the application of an insurance policy is concededly *suspended* while the craft's engine is operating, and the boat finds herself in *clear* and *present* danger of collision, is the insurance company bound to take back the risk in the middle of that

danger, merely because the petitioner stopped the engine by cuttting off the ignition; or must not the boat return to a condition of safety before the insurer is required to take back the risk?

Statement of the Case

The Proceedings Below

Petitioner brought this action against respondent on a policy of marine insurance issued with respect to his racing boat "Tomadge IV". The case was tried in the United States District Court for the District of Columbia before the Honorable Jennings Bailey and a jury. At the close of the evidence respondent moved for a direction of a verdict in its favor on the grounds that there was no issue of fact for submission to the jury (R. 95-96). Petitioner also moved for a direction (R. 92). Both motions were denied pending submission to the jury (R. 95-96) of two special interrogatories (R. 94), so that the court could consider the questions of law resulting from the verdict (R. 95). Based upon the jury's negative answers to the interrogatories (R. 102) the court entered judgment in favor of petitioner in the sum of $22,400.74.

After verdict respondent moved the court pursuant to Rule 50 F. R. C. P. to set aside the verdict and for a judgment in accordance with its previous motion for a directed verdict. In the alternative, respondent moved to set aside the verdict and for a new trial. Both motions were denied with a memorandum appearing at pages 11-13 of the record, and reported at 131 F. Supp. 263.

On appeal to the Court of Appeals the judgment of the trial court was reversed, and judgment was directed for the respondent (R. 118). Thereafter a Petition for Rehearing *en banc* (R. 120-127) was denied (R. 128).

The Racing Boat

Petitioner was the owner of a hydroplane type racing boat named the "Tomadge IV", sometimes called "Miss Steaks". She was 21 feet long by 9½ feet wide and designed to attain speeds of 90 miles per hour (R. 35-36). Designed *solely* for racing she had *no clutch nor reverse gear.* When moving at speeds between 15 and 25 miles per hour she went "on the step"—she "planed" i. e., she rose out of the water and moved like a hydroplane (R. 36-37). At lower speeds she went "off the step" i. e., she settled in the water. Because of her size and speed she had limited use. All in all, considering tuneups, trials and races, her engine operated only about 25 hours in a whole season (R. 51).

The Accident

On June 5, 1949 petitioner planned to race the "Tomadge IV" in the Maryland Yacht Club Races at Rock Creek, Maryland. She had participated in one race earlier in the day (R. 26) but the engine was not performing properly so after adjustments petitioner took her out for a trial spin (R. 25-26). The course at Rock Creek was narrowly confined. When petitioner came out for this trial spin, another race was about to start and small craft dotted the water of the Creek in the area just off the course which was

assigned to spectator boats. The course thus being occupied, he took a course leading up the Creek, turned around and headed back toward the course (R. 28). While going 30 to 35 (R. 29) to 40 to 45 miles per hour (R. 64) and "on a plane plenty" (R. 72) he became blinded by the glare of the sun (R. 28-29). Recovering his vision on a sharp turn he found himself heading into the spectator boats (R. 43). The Bowen boat was about 200 feet in front of him (R. 38-39) lying stationary in the water (R. 68). Failing to answer her helm on the turn the "Tomadge IV" skidded and crashed into the Bowen boat (R. 29-32). One occupant was killed and the other severely injured. When less than 100 feet from the Bowen boat (R. 40) petitioner cut his engine in an attempt to bring her out of the skid (R. 29-30) but the momentum imparted by the engine kept him going (R. 41). By his own admission (R. 63-64) he was going 25 miles per hour when the collision occurred. Other witnesses thought he was going faster (R. 72, 74). By his own admission also, it was the momentum imparted by the engine that produced the contact with the Bowen boat (R. 41) and if the engine had not been operating, there would have been no skid (R. 67) and no collision (R. 91).

As a result of the accident petitioner was sued for personal injuries and death. He called upon respondent to defend under the insurance policy and respondent declined. After compromising both suits petitioner brought this action against respondent seeking to recover the amounts paid plus his hull damage and legal fees. It was stipulated below that these sums were reasonable, and, therefore, the sole issue was whether the protection of this specially drawn policy extended

to the occurrence shown by the undisputed physical facts and the admissions of petitioner.

The Marine Insurance Policy

The policy sued upon is reproduced after page 104 of the record. It is a *printed* "Yacht Form" with special *typewritten* insertions designed to adapt it to this racing craft. It includes Hull, Protection and Indemnity, and Compensation insurance.

The reason respondent declined to defend the suits against petitioner is found in a clause *typewritten* into the printed policy, reading as follows:

> "It is understood and agreed that this insurance is free from claim for loss or damage:
>
> 1. During such time as the vessel's engine is operating.
>
> 2. Resulting from the operation of the vessel's engine whether caused by a peril insured against or not."

From the outset it has been respondent's contention that the loss arose either while the engine was operating, or, at the very least, that it resulted from the operation of the engine *within the meaning of the above quoted expression*. That is the only issue which was decided below.

This policy replaced a similar *special* yacht policy written by the New Hampshire Fire Insurance Company. The first policy is reproduced after page 104

of the record as "Defendant's Exhibit No. 2". It contained the following *typewritten* clause:

> "It is expressly understood and agreed that insurance on the within named vessel ceases at the moment the vessel is launched."

Respondent's policy was issued following conversations between its agent, who also acted as petitioner's broker, and petitioner (R. 78-81). It was mailed to petitioner with a covering letter (Defendant's Exhibit 3, reproduced following page 104 of the record) stating that "this coverage is the same as you previously had" and petitioner accepted it as such.

The Decisions Below

All questions as to the intent of the policy, its meaning and construction, were withheld from the jury, and agreed by the parties to be questions for the court (R. 95). Two framed interrogatories, isolated from the policy context, and completely divorced from the intent, meaning and scope of the policy, were submitted to the jury as follows:

1. When the "Miss Steaks" collided with the Century runabout was the "Miss Steaks" engine operating?

2. Did the collision between the "Miss Steaks" and the Century runabout result from the operation of the engine of the "Miss Steaks"? (R. 94, 99-100).

The jury was given no instruction as to the *legal* rule of proximate cause, either in tort or in contract. The trial court, with the assent of counsel, stated "I

will not charge them (the jury) on the question of proximate cause" (R. 98).

The jury answered both questions in the negative, and respondent duly moved to set aside the verdict and for the direction of a verdict in accordance with its prior motion; alternatively, respondent moved to set aside the verdict for a new trial with respect to each of the separate interrogatories answered by the jury on the grounds that the record was totally devoid of evidence to support such a verdict, and that the verdict was contrary to the evidence. Both motions were denied by the trial court in a short memorandum (R. 11-13) in which the court said that the collision resulted not from the operation of the engine, but from the negligent manner in which petitioner operated his speedboat (R. 12). The District Judge took due note of *the uncontroverted physical facts conceded by the petitioner* that the momentum which produced the collision with the stationary rowboat was imparted by her engine (R. 41); and that the collision would not have occurred if the engine had not been operating the instant before (R. 67, 91). These facts, the court observed, seemed to constitute a condition rather than a cause (R. 12).

Nowhere in its opinion did the trial court consider the legal effect of the *nine words* contained in paragraph "2" of the engine exclusion, viz., the *nine words* which exclude claims arising as the result of the operation of the vessel's engine:

> "whether caused by a peril insured against or not."

Respondent's position was that these words formed a vital part of the policy contract, and had to be given effect.

The Court of Appeals reversed the trial court and granted respondent's motion for judgment. In so doing it recognized (as Petitioner concedes Pet. p. 3) that this policy was "special and peculiar to the craft (a racing boat) and the purpose for which it was utilized" (racing) (R. 114). It also recognized the extraordinary risks and hazards which the operation of the craft's engine presented, such as "planing" at 90 m.p.h. (R. 114); high octane gasoline; overheating and danger of explosion when going less than 20 m.p.h. (R. 113); the danger of skidding when 'skimming" along the water surface at high speeds (R. 114). It further recognized that the vessel's engine only operated about 25 hours out of the whole year of insurance (R. 113) and that the policy was 'tailormade" to fit all risks except those generated during such 25 hours (R. 113).

The Court of Appeals also gave legal effect to the *nine words* (quoted above) which the trial court had ignored. It pointed out that from a *tort* standpoint i. e. as between petitioner and the innocent victims of the collision, there was no doubt that petitioner's *negligence* was the proximate cause of the collision; but from a *contract* standpoint—reading the engine exclusion within the context of this special policy—there was no question of fact, as to the intention of the policy, i. e. the undisputed physical facts and the admissions of the plaintiff, read against the policy as construed by the court, left only one single permissible inference viz, that this kind of a claim was excluded by the policy (R. 110-111). This was a question which the parties had agreed was for the court. There was no dispute on the facts of the occurrence, and the parties had agreed that the question of policy intent, meaning, and construction was for the court.

ARGUMENT

Respondent's motion for judgment n.o.v. was properly granted by the Court of Appeals. The agreed physical facts and petitioner's solemn admissions made an undisputed record as to how the accident occurred. All questions of policy intent and construction were, by agreement, left to the court, and those are the only issues which the Court of Appeals decided, overruling the trial court. No other issue remained, but if any did remain, petitioner, having agreed to the submission of the two special interrogatories to the jury, under Rule 49 F. R. C. P. waived any right to a jury trial with respect thereto. The issue of the intent and construction of the policy was properly decided. The petition discloses no ground for granting certiorari.

With the consent of both counsel the trial court instructed the jury as follows:

> "The Court: Counsel has called my attention to the fact that I omitted to say to you that you are not concerned with the legal construction of this policy, nor with the evidence bearing on the legal construction of it, but solely to answer these two issues based upon the evidence, as I have indicated to you" (R. 102).

Bearing most heavily on any rational construction of this policy were the *nine words* which the trial court ignored in its memorandum opinion. These *nine words* were part of a *typewritten* engine exclu-

sion. They represented the latest expression of the parties' intent and prevailed over any printed matter (*Aetna Insurance* v. *Houston Oil*, CA-5, 49 F. 2d 121, 123, cert. den. 284 U. S. 628). They conditioned the whole engine exclusion, and the whole contract, in the clearest language possible of selection. The policy was to be free of all claims arising during the operation of the vessel's engine, or resulting from the operation of the vessel's engine

> "whether caused by a peril insured against or not"

Thus where the engine exclusion is effective, it makes no difference whether an insured peril was the *proximate cause* of the loss. In such case the question of proximate cause is lifted out of the case by the terms of the contract. Certainly if an accident happens *while* the engine is operating, all questions of proximate cause are, *ipso facto*, eliminated. Can there be a different answer when the collision happens *two seconds* after the engine is shut off in a futile attempt to avoid a collision? The policy answers that question, since it also excludes accidents *resulting* from the operation of the engine—and petitioner has conceded that the engine momentum brought about the physical contact with the *stationary* row boat (R. 41, 67, 91).

Petitioner's heavy reliance on *Standard Oil Co.* v. *U. S.*, 340 U. S. 54, is misplaced. In that case the sole question was whether the loss was "a consequence of warlike operation" viz, a question of proximate cause. This court confined its determination to the question whether, *as a matter of law*, such a policy provision—without anything further—extended cov-

erage to a collision between the merchant vessel and the minesweeper. The district court, and the Court of Appeals, drew different inferences from the same state of facts. This court held it could not, *as a matter of law,* disturb the fact finding of the Court of Appeals. This court, however, was careful to point out that *"the intention of the contracting parties would control this decision, but as is so often the case, that intention is not readily ascertainable"* (340 U. S. 54, 57, our emphasis).

In the case at bar the "intention of the contracting parties" is ascertainable, *and has been ascertained.* The finding on that point, whether it be of fact or of law, was, by agreement, left to the court—not to the jury. Viewing this "special and peculiar" policy, tailormade to grant only a *limited* insurance on this especially hazardous racing boat, the Court of Appeals has found that it was not "the intention of the contracting parties" to grant insurance in this undisputed fact situation.

The petitioner misconceives the import and effect of the decision of the Court of Appeals. He argues that the determination of the *cause* of loss was a question of fact for the jury, and that the jury's conclusion is final. From this premise he goes to the constitutional point, and argues that the Court of Appeals has usurped the jury's function by granting respondent's motion for judgment n.o.v. This misconception is basic and fundamental. The question of *proximate cause* was *not* decided by the jury. With the consent of counsel, it was *expressly withheld from the jury.* Judge Bailey said:

> "I will not charge them (the jury) on the question of proximate cause" (R. 98)

and also:

> "I will instruct them (the jury) that they are not concerned with the legal construction of the policy, but solely with the issues I have submitted to them" (R. 101)

Thus when these two special interrogatories went to the jury, they went in a *vacuum*—totally *unrelated* to the policy context—totally *removed* from all questions of contractual intent and construction; and totally *divorced* from all questions of proximate cause. The jury's answers never could have been more than advisory to the trial court in its decision of the question of policy intent committed to it by agreement of the parties. The Court of Appeals takes careful note of this in its opinion (R. 108).

Indeed the Court of Appeals felt that these two interrogatories were "improvidently" (R. 108, footnote) submitted to the jury, and that on the *true issues* there was *no* fact question whatever. The *true issue* was not whether *petitioner's negligence* was the proximate cause of the collision—that was a tort concept—but as the Court of Appeals said "What is critical is whether the claim was one 'resulting from' the operation of the racing boat's engine" (R. 115), within the fair meaning and intent of the contract. Even if that were a fact question of proximate cause (as petitioner claims) it could not possibly have been decided by the jury, because all questions of proximate cause were specifically withheld from them (R. 98); and they were asked to say, without regard to the policy, its purpose or intent, and unaided by any instruction, whether the collision "resulted" from the operation of the engine. That indeed was an interrogatory in a vacuum.

However the District Court, and the Court of Appeals on review, were not so circumscribed. They had everything before them. They had the policy and the whole body of documentary evidence (and offers of proof) dealing with the parties' intent (R. 78); with the form of the prior policy (R. 83, 104); with respondent's rates and underwriting practices (R. 76-77, 80-81), etc. They had the physical facts of the collision and the admissions of petitioner.

On this whole record the *court*, not the jury, was required to determine whether this accident was one "resulting from" the operation of the engine. That question had been committed to the court by the agreement of the parties (R. 98, 102). In resolving this question the Court of Appeals called to its aid the proximate cause cases and said "Thus, whether the collision or Keane's (petitioner's) negligence was a peril insured against or not, or whether the former was caused by the latter, becomes immaterial. What is critical is whether the claim was one 'resulting from' the operation of the racing boat's engine" (R. 115), and the court concluded that the meaning, intent and purpose of the engine exclusion of the policy was such as to exclude this accident from the coverage.

With the utmost respect to petitioner we submit that the petition rests upon a basis which is contrary to the record. At page 5 of the petition it is stated that the issue in the courts below was whether "the cause of petitioner's loss, *within the meaning of the policy*, was to be decided as a question of fact or as a question of law; * * * petitioner argued that the issue was one of fact, and that the verdict of the jury was conclusive." (Our emphasis.) Manifestly this jury could decide *nothing* "within the meaning

of the policy" because the policy was never put to the jury, and because the jury was instructed that the "construction of this policy, (and) * * * the evidence bearing on the legal construction of it" was not their concern (R. 102). It was however the concern of the trial court, and the Court of Appeals.

This indeed was a typical case for a direction of a verdict, there being no dispute of fact or permissible inference. *Brady v. Southern Ry. Co.*, 320 U. S. 476, places that beyond question. In that case the late Mr. Justice Reed said:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." (479-480)
>
> * * * *
>
> *The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause.*" (483, our emphasis)

The rule of the *Brady* case becomes more compellingly applicable to the case at bar when it is recalled that the policy here in question was a special form of contract designed to exclude those great (practically uninsurable (R. 80)) hazards of a high speed racing boat, and that the engine exclusion contains those *nine words* "whether caused by a peril insured against or not". Manifestly such a contract provi-

sion is different from the war risk policy in *Standard Oil Co.* v. *U. S.*, 340 U. S. 54. It appears specifically designed to exclude the case by case factual analysis called for by "the proximate cause method of determining on the facts of each case whether a loss was the 'consequence' of warlike operations * * *" as referred to in the last paragraph of Mr. Justice Black's opinion (340 U. S. 61).

In reaching its decision the Court of Appeals made no inappropriate resolution of conflicting evidence, an appellate practice identified and condemned by Mr. Justice Black in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 60); nor did it "reweigh" the evidence (*Tennant* v. *Peoria*, 321 U. S. 29, 35). There was no conflicting evidence. The Court of Appeals considered the same uncontroverted evidence which led the trial judge to find that the collision occurred "*during the operation of the speed boat*" (R. 11, 111) and "that had the engine not imparted the original motion to the boat the collision would not have occurred" (R. 12, 111). Its sole function was to rectify the trial court's misconception of the policy, and the trial court's attempt to "rewrite" the policy by failing to recognize the significance of the *nine words*.

Referring to the trial court's misconception of the coverage the Court of Appeals carefully noted that "there is no question that *as between Keane and the victims* of the collision, Keane's negligence was the proximate cause of their loss" (emphasis supplied). But, it said, on the fact findings made by the District Judge, and considering the policy exclusion "*as between the insured and the appellant*, it is clear that that collision must be attributed to a cause 'resulting

from the operation of the vessel's engine' " (R. 110-111).

Furthermore petitioner has sustained no violation of his constitutional rights to a jury trial. A verdict properly directed does not violate the Seventh Amendment. *Galloway* v. *U. S.*, 319 U. S. 372, 389.

Concededly if the engine had been operating at the instant of impact there would have been no coverage because the loss would have fallen squarely within the first part of the engine exclusion. Concededly too, all insurance coverage was suspended until the instant the engine stopped operating. However, petitioner contends that he regained coverage by the *flip of a switch* when less than 100 feet from a stationary runabout (R. 40) and when in imminent danger of collision. He says this despite the fact that at the instant of impact he was travelling 25 to 30 mph and that the momentum imparted by the engine brought about the collision.

We submit, however, that the insurer was not required to take back the insurance now burdened with an imminent peril of loss. To permit this restoration of coverage would be similar to permitting a fire insurance company to cancel its policy after a fire had started but before it caused damage. We have argued throughout this litigation that the insured could not increase the risk and put an added burden on the insurer by using the engine, and then, when danger arose, restore the insurance by merely turning off the engine and coasting to a collision.

The Court of Appeals for the Second Circuit decided this very point in *Heafjes* v. *Aetna Ins. Co.*, 132 F. 2d 715, cert. den. 319 U. S. 760. There, it will be recalled, the policy, insuring a small tugboat, warranted that the tug would not take more than one vessel in tow. She was able to handle more than one barge in calm weather but not in storms. While towing more than one barge in violation of the warranty, a storm arose. Finding herself and her tow in imminent danger she cut the towing hauser; thus she was no longer towing anything and the breach of warranty was technically at an end. She started for port but sank on the way by reason of an injury received while she was towing. The trial Court's direction of a verdict for the insurance company was affirmed by the Court of Appeals and this court denied certiorari. In affirming, the Court of Appeals said in part:

> "* * * it does not follow that when the breach of warranty ended, the suspension of the policy was ended at the same time. * * *".
>
> "* * * our construction need not, and does not, permit a tug owner to break the warranty by towing more than one vessel and when trouble comes get his insurance back in force in ample time as a practical matter merely by cutting the line to the forbidden tow. * * * The insured may not by breach of warranty increase the risk and put that added burden upon the insurer. The latter need take back only what he had before and that obviously did not include the dangers faced by the tug in fulfilling her duty to her tow of this kind at this place" (pp. 719-720).

Conclusion

The reversal below was proper. Considering the uncontroverted physical facts and admissions of the petitioner in the light of the most favorable inference rule as well as the agreement of the parties that all questions concerned with policy construction, and the evidence bearing thereon, were reserved for the court, the law commanded a reversal of the trial court and direction of judgment for the insurer. In reversing the judgment of the trial court the Court of Appeals did not depart from the accepted usual course of judicial procedure. The decision is in accord with decisions of this court and does not violate petitioner's constitutional right to a trial by jury. Therefore, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted.

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